IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA

PLAINTIFFS

v.

CASE NO.: 05-CV-00329 GKF –SAJ

TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC.

DEFENDANTS

DEFENDANTS' REPLY ON THEIR MOTION TO STRIKE OR EXTEND RESPONSE DEADLINE AND FOR ESTABLISHMENT OF SCHEDULE FOR RESOLVING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Tyson Foods, Inc., Tyson Poultry Inc., Tyson Chicken, Inc. Cobb-Vantress, Inc., Cal-Maine Farms, Inc., George's Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc. ("Defendants") hereby reply to the "State of Oklahoma's Response to 'Defendants' Motion to Strike or Extend Response Deadline and for Establishment of Schedule for Resolving Plaintiffs' Motion for Preliminary Injunction." [DKT #1380].

I. Plaintiffs' Proposed Scheduling Order is Unreasonable and Contrary to Their Demands for an Extraordinary Remedy

Plaintiffs' proposed schedule is unfair, unreasonable and clearly offered with the strategic goal of prejudicing Defendants' right to offer a meaningful challenge or rebuttal to the

conclusory opinions of nine previously undisclosed experts. Plaintiffs undoubtedly have been working with these nine experts extensively over the 2 ½ years this lawsuit has been pending to develop the opinions now put forth in support of their motion for a "preliminary" injunction. Having now sprung these opinions upon the Defendants and the Court in a motion that they chose to file just a few months before their self-declared emergency of the coming "spring rains," it is absurd for Plaintiffs to insist, as they do in their proposed schedule, that the Defendants and this Court "expeditiously" adjudicate Plaintiffs' motion in less than two months. The Court should reject Plaintiffs' proposed schedule and set a timetable that allows the Defendants and this Court to appropriately evaluate the State's sweeping allegations and unprecedented demands for injunctive relief.

The remedy that Plaintiffs request demands that the facts be adequately discovered and tested, rather than rushed and ignored. Plaintiffs ask this Court to enjoin the well-established practices of thousands of farmers who are not parties to this litigation, along with the fertilizer-management laws and regulatory systems of two states (one of whom is also not a party to this litigation). The State cannot expect the Court to entertain such a request to change the status quo without careful development and evaluation of the relevant facts and expert opinions. As the Tenth Circuit has cautioned, "any motion for injunctive relief that seeks to alter the status quo, such as the motion in this case, 'must be more closely scrutinized to assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.'" *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1231 (10th Cir. 2005) (quoting *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (en banc), *aff'd*, 546 U.S. 418 (2006)). *See also, e.g., Commercial Sec. Bank v. Walker Bank &*

Trust Co., 456 F.2d 1352, 1356 (10th Cir. 1972) ("Great care must be used in the granting of interlocutory or final injunctive relief because of the extraordinary nature of that remedy.").

Plaintiffs seek to require Defendants to immediately respond to the State's Motion and designate Defendants' expert witnesses by December 17, 2007. Following quickly behind, Plaintiffs propose that Defendants take the depositions of the State's previously-undisclosed nine experts (without the benefit of any document discovery) and that Plaintiffs take the depositions of whatever experts the Defendants may designate in a 28 day span which encompasses both the Christmas and New Years holidays. This proposed time frame for depositions is completely unrealistic and tailored to prejudice the Defendants' ability to discover and inform the Court of the facts relating to the Plaintiffs' motion.

Indeed, as discussed below, shortly after Plaintiffs unveiled their "preliminary" motion, the Defendants asked the State to produce the data and documents relating to the expert affidavits that are attached to the motion (many of which should have been produced months ago under the Defendants' many pending discovery requests and this Court's orders). Plaintiffs have steadfastly refused to produce any of this information. This suggests that the process of forcing the relevant data from the Plaintiffs will be a lengthy task, and that process must be completed before the Defendants' experts can begin to evaluate the State's data, assumptions and conclusions and before any expert depositions can occur

Plaintiffs filed this lawsuit more than two and one-half years ago and have apparently worked on this complex legal and factual ambush for quite some time. In these circumstances, requiring Defendants to hurriedly throw together a defense in less than 45 days with the benefit of only "limited discovery" into the information Defendants and their experts will need to evaluate the expert opinions which form the entire basis of Plaintiffs' motion is simply

unreasonable. *See F.T.C. v Atlantic Richfield Co.*, 1990 WL 117290 (D.D.C. Aug. 3, 1990)("… [P]laintiff's motion for preliminary injunction concerns complex factual and legal issues which the FTC has had ten months to consider and develop. To order defendants to immediately counter the Government's extensive allegations would be unreasonable"). Defendants have asked their experts to review the nine expert affidavits submitted by Plaintiffs as part of their "Preliminary" Injunction Motion. These affidavits are so vague, conclusory and devoid of references to the specific data reviewed, analysis performed or methods utilized that Defendants' experts cannot respond meaningfully to Plaintiffs' accusations without substantial additional information. (*See* Ex. A, attached hereto, Aff. of M. Samadapour ¶ 9.) Defendants' experts estimate that they will need three to six months to review and analyze the withheld information and prepare appropriate rebuttal reports or affidavits. None of this work can commence until Plaintiffs relent on their current refusal to release any of this information.

As part of the briefing schedule for the preliminary injunction motion, this Court should compel Plaintiffs to provide full Rule 26 expert disclosures by a date certain. Relatedly, the Court should allow Defendants sufficient time to analyze both the expert disclosures and Plaintiffs' responses to Tyson's expert discovery before providing rebuttal disclosures and response briefing. The briefing schedule proposed by Defendants in their Motion for Establishment of Schedule for Resolving Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 1380, pp. 7-8) is fair and reasonable. Unlike Plaintiffs' proposed timetable, Defendants' schedule provides a short but adequate period for discovery and sufficient time for the development of rebuttal reports by Defendants' experts in advance of Defendants' being required to file a written response to Plaintiffs' expert-laden motion. Accordingly, Defendants hereby renew their request for entry of pre-hearing schedule in accordance with the deadlines proposed

in Defendants' Motion for Establishment of Schedule for Resolving Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 1380, pp. 7-8).

In their Response, Plaintiffs cite the unpublished opinion of a Washington district court in *Seattle Audubon Soc'y v. Sutherland*, 2007 WL 1655152 (W.D. Wash. June 5, 2007). Plaintiffs argue *Seattle Audubon* supports their argument that the filing of a motion for preliminary injunction somehow relieves them of the typical expert disclosure and discovery obligations under Rule 26. Plaintiffs failed to provide the Court with a copy of that opinion likely out of fear that this Court might actually read the opinion and conclude that the holding of that case has been misrepresented. Defendants attach a copy of this opinion as Exhibit 2. In truth, the *Seattle Audubon* case actually supports the schedule proposed by Defendants and rejects the type of trial-by-ambush approach requested by Plaintiffs. In that case, the district court denied a motion to strike expert declarations in support of a preliminary injunction motion that were disclosed too late under the default pre-trial schedule of Rule 26(a)(2)(C). *Id.* at *1. In its discretion, the court found that the parties' stipulated expert disclosure schedule controlled rather than the trial disclosure schedule of Rule 26(a)(2)(C). *Id.* The case actually assumes that parties *should* provide Rule 26 expert disclosures *months before* a preliminary injunction hearing, as the *Seattle Audubon* parties so stipulated. *See id.* (using at least a four-month expert and rebuttal disclosure schedule). This Court should likewise schedule Rule 26 expert disclosures by Plaintiffs, followed a sufficient time later by rebuttal expert disclosures from Defendants.

II. Plaintiffs' Proposed Schedule Seeks to Evade Defendants' Discovery Requests

Both before and after the filing of Plaintiffs' "Preliminary" Injunction Motion, Defendants have diligently pursued discovery aimed at avoiding the very prejudice that Plaintiffs now seek to inflict with their unreasonable schedule – the prejudice of having to defend against

vague and conclusory claims of "health risks" by Plaintiffs' paid experts without knowing the factual or scientific basis, if any, for such claims.

In May 2006 the Tyson Defendants issued discovery specifically requesting disclosure of any evidence supporting a claim that Defendants' actions posed an imminent or substantial endangerment to human health. At the same time, the Tyson Defendants specifically asked Plaintiffs to identify any experts who would testify at *any hearing* to be held in this case and the basis of any opinions to be offered by those experts. (*See* Dkt # 1380 Exs. C and D.) Plaintiffs elected not to disclose the identity of these experts, their opinions, or the basis for these opinions in response to these May 2006 discovery requests. Nor did Plaintiffs disclose the identify of these experts, the substance of their opinions, or the basis for those opinions at any time over the year and a half that has followed. Instead, Plaintiffs have withheld this critical information until it was convenient for Plaintiffs to disclose the identity of these surprise experts as part of Plaintiffs' "emergency" motion for a "preliminary" injunction.

Defendants were equally as diligent in seeking discovery from Plaintiffs as to the basis for the opinions of the nine experts once those opinions were disclosed with the November 15 filing of Plaintiffs' motion. Once again, Plaintiffs have decided to ignore Defendants' requests for information. Plaintiffs have failed to provide Rule 26 expert disclosures, expert reports or non-evasive answers to Defendants' expert interrogatories for the nine experts who submitted affidavits in support of the Motion for Preliminary Injunction.

On November 16, 2007 the Cargill Defendants requested that Plaintiffs provide Rule 26(a)(2) expert disclosures for each of the nine experts. (*See* Dkt # 1380 Ex. A.) On November 29, 2007, Plaintiffs' advised Cargill that they would provide no such information. Plaintiffs offer no explanation as to why Rule 26's mandatory disclosures regarding testifying experts do

not apply to experts testifying in a preliminary injunction hearing.[1] In stark contrast to Plaintiffs' position, courts routinely require Rule 26(a)(2) disclosures for expert witnesses in preliminary injunction hearings. *See e.g.*, *Storck USA, L.P. v. Farley Candy Co.*, 1995 WL 153260, *3 (N.D.Ill. 1995) (observing that expert disclosures related to a preliminary injunction motion are to be made "[a]ccording to Federal Rule of Civil Procedure 26(a)(2)(B)"); *Dunkin' Donuts Inc. v. Patel*, 174 F.Supp.2d 202, 209 (D.N.J. 2001) (observing that "[t]he Scheduling Order also specified that expert reports 'shall contain the information required by Federal Rule of Civil Procedure 26(a)(2)(B)'"); *General Elec. Co. v. County of Cook*, 2001 WL 417321, *2 (N.D.Ill. 2001) (observing that "[a] schedule was set for the briefs on the preliminary injunction hearing, and the order provided, '[a]ny Rule 26 disclosures of experts expected to testify at the preliminary injunction hearing shall be served by 12/8/00.'"); *Seattle Audubon Soc.*, *supra*, 2007 WL 1655152, *1.

On November 16, 2007 (one day after the filing of Plaintiffs' motion), Defendant Tyson Foods, Inc. served document requests on Plaintiffs seeking the working files of each expert and

[1] In addition to arguing that Rule 26(a) disclosures are not required in the context of a preliminary injunction motion, Plaintiffs claim that the State's "rolling production of sampling data" which began on February 1, 2007 should provide Defendants some clues about the basis for the opinions offered by their nine experts. (Dkt. No. 1383, Pltfs. Response, p. 5.) Plaintiffs omit several important facts from their discussion of the State's purportedly generous production of sampling data. First, the production was court-ordered after the Court rejected Plaintiffs' absurd claims of work-product protections over their sampling data. *See* January 5, 2007 Order (Dkt. No. 1016). Second, this court-ordered production is still not complete (in defiance of this Court's orders) and key information directly bearing on Plaintiffs' preliminary injunction motion still has not been produced. (*See* Ex. B, November 30, 2007 Letter from R. George to L. Bullock). Third, Plaintiffs have offered a host of experts whose opinions are in no way founded upon sampling or testing conducted by the State in the IRW. *See* Exs. 2-5, 13-17 to Pltfs. Motion (Dkt. No. 1373), (affidavits including opinions on economics, number or recreational users of the IRW waters, number of poultry raised in the watershed and alleged increased incidence in disease based on county health data.) Plaintiffs surely are not representing that the basis for the opinions of each of their nine experts is found in the "court-order production of sampling data."

reports and testimony by the experts that discuss poultry production, the relationship between integrators and contract growers, land application of poultry litter, human health, ecological, and environmental risks associated with exposure to nutrients, metals, bacteria, hormones, environmental conditions of the IRW and recreational use of the IRW. (*See* Dkt. No. 1383, Ex 3). Responses to this discovery are due on December 17, 2007, the same day that Plaintiffs propose request Defendants' Response to the Preliminary Injunction Motion be due. Instead of expediting this discovery to accommodate their proposed expedited schedule, Plaintiffs have signaled to Defendants that they intend to object to these discovery requests but they have not even revealed the grounds of any objections. They have provided no substantive information to the Defendants in response to the requests. On November 29, 2007, in a further effort to ensure production of the documents necessary to depose Plaintiffs' experts, counsel for the Tyson Defendants issued 9 subpoenas duces tecum directed to the Plaintiffs' experts commanding them to produce the same documents requested in Tyson requests for production. (*See* Ex. C, November 29, 2007 ltr from M. Bond to D. Riggs and 9 subpoenas). Plaintiffs agreed to accept service of the subpoenas on behalf of their experts but specifically stated they reserve the right to object to the discovery sought. Plaintiffs' experts are required to produce pursuant to the subpoena on December 10, 2007. Plaintiffs have not expedited their response or objections, but appear to be waiting for all of these dates to run their full course before objecting to the production of this critical information.

Plaintiffs clearly hope to force defendants to depose their nine previously undisclosed experts without the benefit of prior discovery into the basis for the opinions offered by these experts. In furtherance of their effort to run out the clock, on November 28, 2007 Plaintiffs sent Defendants a letter which proposed a schedule for deposing the Plaintiffs' experts. (*See* Dkt. No.

1383, Ex. 1.) Upon receipt of this letter counsel for Tyson Foods agreed to work cooperatively with Plaintiffs in scheduling depositions but explained that these depositions could not occur until after Plaintiffs produced the expert materials requested in Cargill's letter and Tyson's Requests for Production. (*See* Ex. D, attached hereto, November 28, 2007 e-mail from R. George to D. Page).[2] Plaintiffs have yet to even respond to Tyson's inquiry about when the State's information will be forthcoming. While Plaintiffs' anxiety about the ability of their experts and their opinions to withstand serious scrutiny from a well-prepared lawyer is understandable, this clearly is not a proper goal.

Plaintiffs claim they have no duty at this time to provide the requested information because they have not requested a "trial" on their "Preliminary" Injunction Motion and the Amended Scheduling Order does not require them to produce this information until April 1, 2008. (*See* Dkt. No. 1383 at pgs. 4-5.) This is absurd. The fact that Plaintiffs' Preliminary Injunction Motion relies exclusively on broad and unsupported affidavits of previously undisclosed experts should prohibit them from refusing to produce documents which would presumably support the opinions made by those experts. Although Plaintiffs had as much time as they wanted to hire their experts, develop their testimony, and belatedly reveal the existence of experts, Plaintiffs essentially claim there is just too little time to engage in the necessary discovery. Plaintiffs should have avoided this situation by responding to the Defendants' discovery requests back in May 2006. At a minimum, Plaintiffs should have expected Defendants to seek this discovery and should have had it ready when they filed the Motion for

[2] Despite having been sent on the same day as the November 28, 2007 letter attached as Exhibit A to Plaintiffs' Response, Plaintiffs failed to include defense counsel's e-mail response to Mr. Page's letter.

Preliminary Injunction. Plaintiffs lack of planning (at best) or deliberate gamesmanship in concealing their experts and plans (at worst) should not prejudice the Defendants and the Court.

III. Plaintiffs Offer No Credible Proof of an Impending Emergency

In their Motion for Establishment of Schedule for Resolving Plaintiffs' Motion for Preliminary Injunction, Defendants identified for this Court proof casting serious doubt on Plaintiffs' claims that the alleged "bacteria impairments" in waters in the Illinois River Watershed constitute a public health emergency. (*See* Dkt. No. 1380, pp. 5-7 and Exs. E, F, G.) Plaintiffs do not challenge this evidence in their response and instead rely upon their own unsupported rhetoric of an emergency as the sole basis for requesting that this Court brush aside Defendants' requests for discovery and a reasonable period of time to prepare for an evidentiary hearing.

Plaintiffs' empty declarations of a public health crisis are irresponsible and are contradicted by the very state officials that Mr. Edmondson's office claims to represent in this case. In a recent op-ed piece published in the Tahlequah Daily Press, Rick Stubblefield, former chairman and current member of the Oklahoma Scenic Rivers Commission, the agency with primary environmental responsibility for the Illinois River, described Plaintiff Edmondson's "preliminary" injunction motion as an attempt to "promote a lawsuit like a carnival huckster." (*See* Ex. E, attached hereto, November 30, 2007 Op-Ed, *Edmondson v. State?*, Tahlequah Daily Press.) Commissioner Stubblefield further reported the real facts about bacteria in Oklahoma Streams as follows:

> With regard to bacteria in our streams, Bill Cauthorn with the Oklahoma Water Resources Board reported to the Scenic Rivers Commission in June 2006 that 82 percent of streams in Oklahoma did not meet primary body-contact standards. Bacteria in our streams is a statewide problem [not linked to area where poultry litter has been used as a fertilizer and soil amendment]. Cauthorn further reported

> that the Environmental Protection Agency is investigating to see if the criteria is flawed or if there is an actual pubic health risk.

Id. Simply put, the esteemed commissioner of the Oklahoma Scenic Rivers Commission agrees with what Defendants stated in their Motion for Establishment of a Schedule – "Plaintiffs have irresponsibly manufactured claims of public health crisis in hopes that such claims will prompt an emotional decision by this Court to prejudice Defendants' ability to prepare a defense to these claims by placing Plaintiffs' 'preliminary' injunction motion on a fast-track to an evidentiary hearing." (Dkt. No. 1380, p. 7.) Plaintiffs should be expected to come forward with more than empty rhetoric to justify a forfeiture of Defendants' right to prepare an adequate defense.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of December 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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